APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1019

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellees.

APPEAL FROM THE STATE OF NEW YORK
COURT OF APPEALS

Jurisdictional Statement Filed January 19, 1976
Probable Jurisdiction Noted March 22, 1976

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APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 31, 1972	**—Service of Summons and Complaint on defendants and filing of same in the Supreme Court of the State of New York, County of New York.**
October 31, 1972	**—Service of defendants' Notice of Motion to Dismiss the Complaint.**
December 19, 1973	**—Order and Memorandum Opinion entered denying defendants' Motion to Dismiss the Complaint and denying defendants' motion to require plaintiffs to post a surety bond.**
January 10, 1974	**—Defendant's Notice of Appeal to the Appellate Division of the Supreme Court of New York County filed.**
July 9, 1974	**—Order of the Appellate Division entered directing that the judgment below be modified to declare that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional.**
August 22, 1974	**—Judgment entered by the trial court pursuant to order of the Appellate Division declaring that the provisions added to the Tax Law by Chapter 827 of the laws of 1968 are valid and constitutional.**
August 23, 1974	**—Plaintiffs' Notice of Appeal to the State of New York Court of Appeals filed.**
October 21, 1975	**—Opinion and order of the Court of Appeals entered affirming the order of the Appellate Division.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Boston Stock Exchange, Cincinnati Stock Exchange, Detroit Stock Exchange, Midwest Stock Exchange, Incorporated, Pacific Coast Stock Exchange, PBW Stock Exchange, Inc.,

Plaintiffs,

v.

State Tax Commission, Norman Gallman, Milton Koerner, and A. Bruce Manley, as members of the State Tax Commission of the State of New York,

Defendants.

Complaint

Plaintiffs by their attorneys complaining of the above-named defendants allege:

1. Plaintiffs Boston Stock Exchange, Detroit Stock Exchange and Pacific Coast Stock Exchange are unincorporated associations. Plaintiff Cincinnati Stock Exchange is an Ohio not-for-profit corporation. Plaintiffs Midwest Stock Exchange, Incorporated and PBW Stock Exchange, Inc. are Delaware corporations. Plaintiffs are hereinafter sometimes referred to collectively as "plaintiff Exchanges." The members and member organizations of plaintiff Exchanges utilize the facilities of the respective plaintiff Exchanges to effect purchases and sales of securities for their own respective accounts or for the accounts of customers or both. Each of the plaintiff Exchanges maintains its trading facilities and principal place of business outside of the State of New York and all sales of securities effected on each of the plaintiff Exchanges are effected outside of the State of New York. Each of the plaintiff Exchanges

is registered as a national securities exchange under Section 6 of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78f). Each of the plaintiff Exchanges brings this action on its own behalf and on behalf of all of its respective members and member organizations.

2. The defendant State Tax Commission is the agency of the State of New York which is charged under the laws of the State of New York (Tax Law, §§ 171, 176, 271, 279-a, 279-b, et al.) with the determination and collection of the "Stock Transfer Tax" as hereinafter defined.

3. Defendant Norman Gallman is president of the State Tax Commission and the Commissioner of Taxation and Finance. Defendants Milton Koerner and A. Bruce Manley are the two commissioners on the State Tax Commission. Defendants Gallman, Koerner and Manley are sued in their respective official capacities as hereinabove stated.

4. Since prior to July 1, 1969 there has been in force and effect a statute of the State of New York which provides in part as follows:

> **"1. There is hereby imposed and shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock . . ." N. Y. Tax Law, § 270; N. Y. Laws 1909, c. 62, as amended.**

This statute and the tax imposed thereby are hereinafter referred to as the "Stock Transfer Tax."

5. Prior to July 1, 1969 all transactions subject to taxation under the Stock Transfer Tax were taxed at a rate based solely on the selling price per share of the stock subject to taxation. Prior to such date, neither the place in the United States where the sale was made nor the State

of the United States in which the seller resided had any bearing on the rate of tax of the Stock Transfer Tax.

6. In 1968 the New York legislature enacted a statute (N. Y. Laws 1968, c. § 827), Section 4 of which amended the Stock Transfer Tax by adding Section 270-a thereto. By the terms of said statute, said Section 270-a became effective July 1, 1969. Said Section 270-a ("the 1969 Amendments") provided in part as follows:

> "1. Notwithstanding the provisions of section two hundred seventy of this chapter on and after July first, nineteen hundred sixty-nine, the rates of tax set forth in paragraph (a) of this subdivision and the maximum amounts of tax set forth in subdivision two of this section shall apply, *in the case of those sales made within this state* subject to tax under section two hundred seventy and described in paragraph (a) of this subdivision and subdivision two of this section.
>
> (a) On such sales by a nonresident during the periods set forth in the following table, the rates of tax shall be the percentages, set forth in such table, of the rates of tax provided in section two hundred seventy of this article:

Period	*Percentage of Rates of Tax Provided in Section two hundred seventy of this article*
July 1, 1969 to June 30, 1970	95%
July 1, 1970 to June 30, 1971	90%
July 1, 1971 to June 30, 1972	80%
July 1, 1972 to June 30, 1973	65%
July 1, 1973 and thereafter	50%

> The tax so calculated shall not be carried out in its computation beyond four decimal points, that is, it shall be computed to the nearest one one-hundredth of one cent.
>
> • • •

> "2. Where any sale *made within the state* and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale shall not exceed, during the period beginning on July first, nineteen hundred sixty-nine and ending on June thirtieth, nineteen hundred seventy, the sum of two thousand five hundred dollars; during the period beginning on July first, nineteen hundred seventy and ending on June thirtieth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending on June thirtieth, nineteen hundred seventy-two the sum of seven hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-two and ending on June thirtieth, nineteen hundred seventy-three, the sum of five hundred dollars; and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars; . . ." [Emphasis supplied.]

7. The stated purpose of the New York legislature in enacting the 1969 Amendments was to improve the competitive positions of stock exchanges located within New York State and that segment of the American securities industry located within New York State vis-a-vis stock exchanges and participants in the securities industry located outside of New York. The legislative findings of the New York legislature which were enacted as part of the 1969 Amendments provide as follows:

> "The legislature hereby finds that: The Securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of

the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable." N. Y. Laws 1968, c. 827, § 1, eff. July 1, 1968.

8. In general, the principal changes in the determination of the rate of the Stock Transfer Tax effected by the 1969 Amendments are as follows:

(a) transfers of securities by nonresidents of New York which are subject to the Stock Transfer Tax are taxed at a higher rate when the sales thereof are made outside of the State of New York than when such sales are effected within the State of New York; and

(b) a maximum limitation on the amount of the Stock Transfer Tax is available only with respect to the transfers of securities which are sold within the State of New York, while there is no maximum limitation on the amount of the tax with respect to sales made outside the State of New York which are subject to the Stock Transfer Tax; and

(c) the differential between the rate of taxation of transactions made within the State of New York and the rate of taxation of like transactions made without the State of New York has been and will be increased, under the 1969 Amendments on July 1 of each year from 1969 to 1973.

9. Upon information and belief, numerous securities which are bought and sold in the United States are delivered in the State of New York or are transferred in non-exempt transactions by the issuers thereof, by banks and by other transfer agents located within the State of New York. All such securities are hereinafter referred to as "Taxed Securities."

10. Upon information and belief, numerous Taxed Securities are regularly traded on plaintiff Exchanges. The Taxed Securities traded on plaintiff Exchanges include securities issued by many major American corporations and securities actively traded in the American securities industry.

11. Upon information and belief, a large portion of the Taxed Securities which are traded on plaintiff Exchanges are also traded on securities exchanges located within the State of New York or are otherwise bought and sold within the State of New York.

12. Upon information and belief, a substantial portion of the securities transactions effected on plaintiff Exchanges by their respective members and the customers of such members and others is in Taxed Securities. The legislative purpose and natural effect of the 1969 Amendments has been and will continue increasingly to be the diversion of such transactions from plaintiff Exchanges to stock exchanges located within the State of New York and the diversion, in general, of securities business from those engaged in that business outside the State of New York to those engaged in the securities business within the State of New York.

13. Clause 3 of Section 8 of Article 1 of the Constitution of the United States (the "Commerce Clause") vests in the

Congress of the United States the exclusive power to regulate commerce among the several states. The sale of Taxed Securities made outside New York State or made by or through the facilities of any plaintiff herein is "commerce among the several states" within the meaning of the Commerce Clause. The Commerce Clause prohibits State legislation which interferes with interstate commerce by placing an undue burden upon or discriminating against interstate commerce. The 1969 Amendments are unconstitutional in that they violate the Commerce Clause because:

(a) they unduly burden interstate commerce by imposing a higher rate of tax when sales by nonresidents of Taxed Securities are made outside the State of New York than when such sales are made within the State of New York;

(b) they discriminate against plaintiff Exchanges, their members and the customers of such members by increasing the cost of selling Taxed Securities in, or using the facilities of, interstate commerce outside the State of New York;

(c) they protect citizens and businesses within the State of New York from competition in interstate commerce through the imposition of higher rates of tax on transfers when sales of Taxed Securities are made outside the State of New York than when such sales are made within the State of New York;

(d) they create a tax rate differential which bears no relationship to the taxpayers' activities or enjoyment of opportunities and protections within the State and which, in fact, discriminatorily, arbitrarily, and unreasonably imposes a lesser tax on transactions which involve greater activity within the State of New York; and

(e) they utilize the state taxing power to regulate commerce between the states by seeking to adjust competitive advantages between local stock exchanges and others in the New York securities industry on the one hand, and their counterparts outside of New York on the other.

14. Section 2 of Article 4 of the Constitution of the United States (the "privileges and immunities clause") provides that, "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The privileges and immunities clause voids state legislation which interferes with the right of citizens of one state to do business in another state on terms substantially equal to those enjoyed by citizens of the other state. The 1969 Amendments violate the privileges and immunities clause by creating an economic barrier for nonresident sellers of Taxed Securities to effect their transactions outside the State of New York, thereby unreasonably discriminating against plaintiff Exchanges, their members and the customers of such members.

15. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in part, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This clause ("equal protection clause") voids state legislation which creates a statutory classification which is not reasonably related to the legitimate purposes of such legislation. The 1969 Amendments violate the equal protection clause because their stated purpose and natural effect is to discriminate in favor of and bestow undue economic advantage upon stock exchanges within the State of New York by diverting business from stock exchanges located outside the State of New York, including plaintiff Exchanges.

16. Defendants have collected and continue to collect taxes imposed by the Stock Transfer Act as amended

by the 1969 Amendments, and the discriminatory impact of the 1969 Amendments will increase on July 1 of each year until 1973 when the lower tax rate and maximum tax reach their most discriminatory levels.

17. The enforcement of the 1969 Amendments with their intended and natural effect of diverting securities business from non-New York stock exchanges, including plaintiff Exchanges, to stock exchanges within the State of New York will inflict increasingly irreparable damage upon plaintiff Exchanges as the discriminatory impact of the 1969 Amendments increases. Such damage will include:

(a) a decline in the volume of securities transactions on plaintiff Exchanges in Taxed Securities and the consequent loss of income as a direct result of such decline;

(b) a growing impediment to the ability of plaintiff Exchanges to attract new members and to retain existing members.

18. An actual and justiciable controversy exists between plaintiffs and defendants with respect to the questions presented herein. The unconstitutional impact of the 1969 Amendments affects every business community in the United States where members of the public and their broker-dealers buy and sell Taxed Securities.

19. The protection of the public interest requires the intervention of this Court, the entry of a declaratory judgment in accordance with the provisions of CPLR § 3001 and allowances of the injunctive relief for which plaintiffs pray herein.

WHEREFORE, plaintiffs pray:

(a) That the certain statute designated Chapter 827, Section 4 of New York Laws 1968, enacted by the New York Legislature, and which purported to become effective July 1,

1969 be declared, adjudged and decreed to be repugnant to the Constitution of the United States and void in its entirety;

(b) That defendants, and each of them, be temporarily and permanently restrained and enjoined from enforcing the aforesaid law and from collecting, imposing, levying, assessing or issuing warrants for the collection of any tax in accordance with the rate structure of the aforesaid law;

(c) That, pending the final determination of the issues in this cause, this Court entered such orders as this Court shall deem appropriate to protect the rights and interests of all persons and governmental bodies having any interest in this cause;

(d) That plaintiffs be granted their costs herein expended and reasonable attorneys' fees; and that plaintiffs have such other, further and different relief as this Court shall deem proper in the premises.

Dated: New York, N. Y.
August 30, 1972

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON,
345 Park Avenue,
New York, New York 10022,
(212) 935-8000,
Attorneys for Plaintiffs.

Schiff, Hardin, Waite, Dorschel & Britton,
231 South La Salle Street,
Chicago, Illinois 60604,
Tel.: Area Code 312 Ce 6-4500,
Of Counsel.

(Verified August 30, 1972.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
(Caption Omitted in Printing.)

Notice of Motion

Sir:

PLEASE TAKE NOTICE that on the summons and complaint herein, a motion will be made at Part I, Special Term of this Court, to be held in and for the County of New York, at the Courthouse in the City of New York, on the 30th day of November, 1972, at 9:30 a.m. or as soon thereafter as counsel can be heard, for a judgment dismissing the complaint herein pursuant to section 3211 of the Civil Practice Law and Rules upon the grounds that:

(a) the Court has no jurisdiction of the subject matter of the cause of action;

(b) the plaintiffs have no legal capacity to sue since they are not subject to the stock transfer tax imposed by Article 12 of the Tax Law and are not legally aggrieved by such provisions and have no legal right to question the constitutionality of its provision;

(c) the pleadings fail to state a cause of action against the defendants;

and for such other, further and different relief as may be proper, with costs of this motion.

PLEASE TAKE FURTHER NOTICE that the defendants will also move at the above Term of this Court for an order to be made and entered compelling plaintiffs to post annual surety bonds to protect the public revenue of the State of New York pending final determination of this action for the reasons set forth in the affidavit of Victor A. Redling, annexed hereto and made a part hereof if plaintiffs obtain the injunctive relief herein sought, and for such

other, further and different relief as may be proper, with costs of this motion.

Dated: October 31, 1972.

Yours, etc.,

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
Attorney for Defendants,
The Capitol,
Albany, New York 12224.

To:

Paul, Weiss, Rifkind, Wharton
& Garrison, Esqs.,
Attention: Warren Green, Esq.,
Attorneys for Plaintiffs,
345 Park Avenue,
New York, New York 10022.

Laws of 1968, chapter 827

(Tax Law, Article 12, § 270-a)

"Section 1. Legislative findings. The legislature hereby finds that: the securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable.

• • •

"§ 3. Subdivision two of section two hundred seventy of such law, as last amended by section two of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

"2. Except as otherwise provided by section two hundred seventy-a of this chapter, the tax imposed by this section shall be two and one-half cents for each share, except in cases where the shares or certificates are sold, in which cases the tax shall be at the rate of one and one-quarter cents for each share where the selling price is less than five dollars per share; two and one-half cents for each share where the selling price is five dollars or more per share and less than ten dollars per share; three and three-quarters cents for each share where the selling price is ten dollars or more per share and less than twenty dollars per share and five cents for each share where the selling price is twenty dollars or more per share.

"§ 4. Such law is hereby amended by adding thereto a new section to be section two hundred seventy-a, to follow section two hundred seventy and to read as follows:

"§ 270-a. Rates for nonresidents; maximum amounts of tax; penalties. 1. Notwithstanding the provisions of section two hundred seventy of this chapter on and after July first, nineteen hundred sixty-nine, the rates of tax set forth in paragraph (a) of this subdivision and the maximum amounts of tax set forth in subdivision two of this section shall apply, in the case of those sales made within this state subject to tax under section two hundred seventy and described in paragraph (a) of this subdivision and subdivision two of this section.

"(a) On such sales by a nonresident during the periods set forth in the following table, the rates of the

tax shall be the percentages, set forth in such table, of the rates of tax provided in section two hundred seventy of this article:

Period	Percentage of Rates of Tax Provided in Section two hundred seventy of this article
July 1, 1969 to June 30, 1970	95%
July 1, 1970 to June 30, 1971	90%
July 1, 1971 to June 30, 1972	80%
July 1, 1972 to June 30, 1973	65%
July 1, 1973 and thereafter	50%

The tax so calculated shall not be carried out in its computation beyond four decimal points, that is, it shall be computed to the nearest one one-hundredth of one cent.

"(b) For the purposes of this section the following terms shall have the following meanings:

"A 'nonresident' shall mean an individual or a group of individuals jointly owning securities (but including partnerships only if organized and operating solely for the purpose of investing in securities) selling or trading on his or their own account, who is not, or no one of whom is, a resident.

"A 'resident' means an individual who on the day upon which the tax imposed by section two hundred seventy of this chapter accrues,

"(1) regardless of where he resides or is domiciled, (i) is a member of a securities exchange within this state which is registered with the securities and exchange commission of the United States; (ii) is a dealer in securities required to be registered with the attorney general of the state of New York; (iii) acts as a dealer in securities or as a broker or agent in transactions concerned with the sale and purchase of securities; or (iv) is a member of or a person employed in a managerial capacity by a firm, company, association or organization, or an officer or director of a person employed in a managerial capacity by a corporation, which is a member organization of a securities exchange, a dealer in securities, or a dealer, broker or agent, described in clauses (i), (ii) or (iii) of this subparagraph, or

"(2) is domiciled in this state, unless on such day he maintained no permanent place of abode in this state, maintained a permanent place of abode elsewhere and during the one year period ending on such day spent in the aggregate, not more than thirty days of such period in this state, or

"(3) is not domiciled in this state, but on such day maintained in this state, a permanent place of abode unless such abode is due solely to such individual's being in the armed forces of the United States, or

"(4) regardless of where he resides, maintains a permanent place of business within this state or is employed within this state.

"(c) No transaction shall be deemed to be by a nonresident and subject to tax at the rates prescribed in this section unless (1) the papers or documents upon or to which are required to be placed or affixed the stamps required by subdivision four of section two hundred seventy of this chapter, to denote the payment of the

tax imposed by such section, have also affixed thereto or placed thereon a declaration in form prescribed by the tax commission signed by the person making the sale or transfer, setting forth facts to show that the transaction is one coming within the provisions of this section; or (2) in the case of transactions executed or effected within this state by any member or member organization of any securities exchange within this state which is registered with the securities and exchange commission of the United States (hereinafter in this section referred to as 'member of a securities exchange') or by any person, firm, corporation, company or association required to be registered with the attorney general of the state of New York as a dealer in securities other than upon any such exchange (hereinafter in this section referred to as 'registered dealer'), who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter, to pay the tax imposed by this article without the use of the stamps prescribed by this article, the sale is certified, in such form as the tax commission may prescribe, in the report required to be made to such exchange, or its affiliated clearing corporation or any authorized agency by rules and regulations promulgated by the tax commission pursuant to section two hundred eighty-one-a of this chapter, as being a transaction coming within the provisions of this section. The certification in such report may be made by such member of a securities exchange or registered dealer if he either (i) has obtained from such nonresident a declaration in form prescribed by the tax commission,

or (ii) has met requirements set forth in rules and regulations promulgated by the tax commission, establishing that the sale is one coming within the provisions of this section and (iii) has not on or after the date of obtaining such declaration or its delivery and filing, received from such nonresident either a notice of cancellation, in form prescribed by the tax commission, as described in subparagraph three of paragraph (b) of subdivision three of this section, and has no knowledge or reasonable grounds to believe that the status of such nonresident as a nonresident has changed.

"2. Where any sale made within the state and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale *shall not exceed*, during the period beginning on July first, nineteen hundred sixty-nine and ending on June thirtieth, nineteen hundred seventy, the sum of two thousand five hundred dollars; during the period beginning on July first, nineteen hundred seventy and ending on June thirtieth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending on June thirtieth, nineteen hundred seventy-two, the sum of seven hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-two and ending on June thirtieth, nineteen hundred seventy-three, the sum of five hundred dollars; and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars; provided, however, that sales made with-

in this state by any member of a securities exchange or by any registered dealer, who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter to pay the taxes imposed by this article without the use of the stamps prescribed by this article, pursuant to one or more orders placed with the same member of a securities exchange or the same registered dealer on one day, by the same person, each relating to shares or certificates of the same class and issued by the same issuer, all of which sales are executed on the same day (regardless of whether it be the day of the placing of the orders), shall, for the purposes of this subdivision two, be considered to constitute a single taxable sale.

"3. (a) Any person who shall knowingly make any false statement in a declaration provided for by paragraph (c) of subdivision one of this section, shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or be subject to both such fine and imprisonment, in the discretion of the court.

"(b) Any person who—

"(1) having executed, filed with and delivered to a member of a securities exchange or a registered dealer a declaration provided for by paragraph (c) of subdivision one of this section;

"(2) thereafter ceases knowingly to be a nonresident;

"(3) fails to execute, file and deliver a notice of cancellation of such declaration, with and to such member or dealer; and

"(4) after ceasing to be such a nonresident and prior to the execution, filing and delivery of such notice of cancellation, with intent to evade or defeat the collection of any tax imposed by this article, places and allows to be executed an order with such member or dealer for the sale of any shares or certificates described in section two hundred seventy of this chapter; shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or be subject to both such fine and imprisonment, in the discretion of the court."

Governor's Message of Necessity (1968 Public Papers of Governor Rockefeller, pp. 651-652)

"To the Legislature:

"Pursuant to the provisions of Section 14 of Article III of the Constitution and by virtue of the authority conferred upon me, I do hereby certify to the necessity of an immediate vote on Assembly Bill Number 6394-A, Senate Print Number 7061, entitled:

• • •

"The facts which, in my opinion, necessitate an immediate vote on this bill are as follows:

"The bill would extend and modify the stock transfer tax including provisions agreed upon by the City of New York and the New York Stock Exchange and considered essential to the continued presence of the Exchange in the City.

"Because the bill in its final form has not been on your desk three calendar legislative days, the Leaders of your Honorable Bodies have requested this message to permit immediate consideration of the bill prior to the anticipated final adjournment of this legislative session.

"GIVEN under my hand and the Privy Seal of the State at the Capitol in the City of Albany this twenty-fourth day of May in the year of our Lord one thousand nine hundred sixty-eight.

[L. S.]

By the Governor:
(Signed) NELSON A. ROCKEFELLER

(Signed) MICHAEL WHITEMAN
First Assistant and Acting Counsel to the Governor"

Governor's Memorandum on Approval of chapter 827, supra (1968 Public Papers of Governor Rockefeller, pp. 552-554; see also: 1968 Legislative Annual, p. 482; 1968 McKinney's Session Laws of New York, Vol. 2, p. 2384)

"STATE OF NEW YORK-EXECUTIVE CHAMBER

ALBANY June 16, 1968

"Memorandum filed with Assembly Bill Number 6394-A, Senate Reprint Number 7061, entitled:

• • •

"APPROVED.

"The bill amends the Tax Law to continue the present rates of the stock transfer tax (which would have otherwise lapsed) until July 1, 1969 and thereafter to provide for a reduction in the rates of stock transfer tax imposed on non-resident individuals and a ceiling on the tax imposed on any single transaction.

"The measure is the product of more than two years' study, discussion and negotiation between representatives of the New York Stock Exchange and the City of New York and provides a long-needed reform of the stock transfer tax, consistent with the growing revenue needs of the City.

"Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry to one of national and international scope. While the bulk of stock transfers still funnels through New York, only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State

where more than 90 percent of trading is in securities listed on the New York Stock Exchange. The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.

"The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and will provide long-term relief from some of the competitive pressures from outside the State.

"As a result of adoption of the revisions of the stock transfer tax contained in this bill, the New York Stock Exchange has announced that it intends to remain and expand in New York and is now studying sites for a new exchange building in downtown Manhattan. The Exchange's action augurs well for the future growth of New York as the Nation's financial center and acknowledges the confidence of the industry in the ability of city government and the Legislature to recognize the industry's problems and to commit themselves to a long-term course for the benefit of all.

"The bill is approved.

(Signed) NELSON A. ROCKEFELLER"

STATEMENT OF ROBERT W. HAACK, PRESIDENT OF THE NEW YORK STOCK EXCHANGE ON THE AMENDMENTS TO THE NEW YORK STOCK TRANSFER TAX.

(A. 6394 and S. . . . .)

March 4, 1968

Bills amending the New York Stock Transfer Tax Law have been introduced in both the Assembly and the Senate. These bills (A. 6394 and S. . . . .) represent the product of many months of discussion with City and State officials. In our opinion, this program of reform of the New York stock transfer tax is a significant example of government and business working together to propose solutions to mutual problems by joint discussion and joint effort.

These bills recognize the financial needs of the City as well as the competitive problems of the New York securities markets by providing for a five-year step-by-step reform program which will result in no loss of tax revenue to New York City. In fact, it is estimated that the revenues from the tax would continue to increase.

Trusting favorable consideration of this program of tax reform by the legislature and Governor Rockefeller, the Board of Governors of the New York Stock Exchange has decided that the Exchange will stay in New York City.

As a matter of fact, the Facilities Committee of the Exchange's Board of Governors has been working diligently since the Committee was created in September with real estate and architectural consultants in developing the Exchange's long-range building requirements and in analyzing possible sites for a new Exchange building in lower Manhattan.

Background of Program of Tax Reform

As a part of New York City's tax program, the stock transfer tax was amended by the Legislature in 1966 to impose a temporary two-year surcharge of 25%. At that time, legislative leaders indicated that the stock transfer tax should be studied during the two-year period.

As a result, the stock transfer tax has been the subject of extensive study by the City, State and the securities industry. These studies indicate that the New York securities markets have experienced increasing competitive problems in recent years from regional stock exchanges located in San Francisco, Los Angeles, Chicago, Detroit, Philadelphia and Boston. Some 88% of share trading on these exchanges is in New York Stock Exchange listed securities.

From 1965 through 1967, the volume of trading on the regional exchanges increased by 73.2%. Regional "cross" volume (a transaction on a regional exchange in which the broker finds both the buyer and seller) has increased by 202% in 1965-67. This indicates the loss of business by the New York markets to the regionals. As their volume continues to grow, a snowball effect develops. They become more competitive and are able to take more and more business away from New York. A loss of business to New York securities markets also means a loss of stock transfer tax revenue to New York City.

Economic realities make it impossible for New York City and State to repeal the stock transfer tax which will produce an estimated $229 million in the current City fiscal year. However, the existing law can be amended in such a way as to ease the competitive disadvantage of the tax on New York securities markets and still preserve the revenue from the tax.

Competitive problems are particularly acute in two areas —non-resident investors and large block transactions.

Non-Resident Individuals

Customers of the New York securities markets who live and work outside the State pay some 80% of the transfer tax. Some non-residents can and do avoid paying the tax by transacting their securities business outside New York on the regional stock exchanges. The brokerage commission charged by these exchanges is the same as in New York. However, none of the cities or states where the regional exchanges are located imposes a stock transfer tax.

Large Transactions

There is also an incentive to avoid the stock transfer tax on large orders. Transactions of 10,000 or more shares on the regional exchanges have increased by 202% in 1965-67.

Proposal for Tax Reform

As a result of these studies, the proposal for tax reform has two basic objectives:

1) Retain the revenue from the tax.

2) Minimize the competitive problems for New York securities markets created by the existing law and provide a sound base for future increased tax revenues.

Over a five-year period, the proposed tax reform would:

1) Provide for a 50% reduction from the existing tax rates for non-resident individuals.

2) Set a tax ceiling of $350 per transaction. On a stock selling for $20 or more the maximum shares taxed would be 7000.

Legislative History

No special tax relief is provided for Exchange members or securities broker-dealers.

In essence, the purpose of the bill is to reduce the incentives to avoid the tax by doing business outside the New York markets.

To prevent any revenue loss to New York City, the bill provides for a step-by-step reduction over a five-year period. The following table shows the precentage increase in volume in each fiscal year during the implementation of the tax reform proposals needed to yield the preceding year's revenue. The right hand column shows the estimated stock transfer tax revenue in each year based upon the average annual growth rate in NYSE volume of 12% a year since fiscal 1952-53.

	Volume Growth Needed to Yield Preceding Year's Revenue	*Estimated Tax Revenue* (millions)
1967-68	—	$299
1968-68	2.2%	251
1969-70	2.7	273
1970-71	4.5	293
1971-72	6.9	307
1972-73	6.2	324

Contributions of the Securities Industry to New York

A healthy securities industry is vital to the economic well-being of New York. A loss of business to the Exchange community means a loss of tax revenue to New York City and State. Equally important is the loss of jobs and other economic benefits.

The following table shows the Exchange Community's contributions to the New York City economy:

Legislative History

Exchange Community's Importance to the New York City Economy

Based on 1966 Data

	Exchange Community	*Entire N.Y.C.*	*Exchange Community As Percent of N.Y.C.*
Jobs	50,000	3.6 million	1.4%
Payrolls	$748 million	$24.4 billion	3.1%
Office Space Occupied	6-6.5 mil.sq.ft.	175 mil.sq.ft.	3.6%
Rentals-Office Space	$45 million	$864 million	5.2%
Real Estate—Taxes*	$8.5 million	$1,519 million**	0.6%
Business Taxes	$17.1 million	$530.0 million	3.2%

In addition, the securities industry contributed an estimated $356.5 million in taxes to the City and State in 1967. This makes it one of the largest taxpayers in the State.

* Does not include that portion of rentals attributable to real estate tax costs of lessor.

** City Fiscal Year 1966-67.

Legislative History

Conclusion

The New York securities industry, particularly the stock exchanges located within the State, have contributed importantly to the economy of the New York City and State and to making New York the financial capital of the world. The securities industry faces a period of tremendous expansion and growth with some 24 million individual shareowners and some 100 million people holding shares indirectly through pension funds and the like. The New York Stock Exchange would like to see the long period of uncertainty that has existed because of the stock transfer tax ended so that we and the entire financial community may move forward for the benefit not only of the securities industry but of the entire State of New York.

Opinion and Decision of the State of New York Court of Appeals

BOSTON STOCK EXCHANGE, et al.
Appellants

v.

STATE TAX COMMISSION, et al.
Respondents

October 21, 1975

Roger Pascal, Chicago, Ill., of the Illinois Bar, admitted pro hac vice, Milton H. Cohen and Allan Horwich, Chicago, Ill., for appellants.

Louis J. Lefkowitz, Atty. Gen. (Robert W. Bush and Ruth Kessler Toch, Albany, of counsel), for respondents.

Adrian P. Burke, Corp. Counsel, New York City (Samuel J. Warms and Robert J. Metzler, II, New York City, of counsel), for the City of New York, amicus curiae.

WACHTLER, Judge.

Since the turn of the century this State has levied a stock transfer tax (Tax Law, § 270). Recently the law was amended to reduce the tax on sales by nonresidents and to fix a maximum tax on all bulk sales within the State (Tax Law, § 270-a). The appellants, all of whom are stock exchanges located outside New York, seek a judgment declaring section 270-a unconstitutional on the grounds that it denies them equal protection of the laws, and discriminates against interstate commerce in violation of the commerce clause (U.S.Const. art. I, § 8).[1]

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[1] In the lower courts appellants also argued that the statute violated the privileges and immunities clause (U.S. Const. art. IV, § 2), but that contention has been abandoned on this appeal.

At Special Term the defendant tax commission unsuccessfully argued that the State courts lacked subject matter jurisdiction, that the appellants lacked standing and that the complaint failed to state a cause of action. The Appellate Division modified, agreeing that the courts had subject matter jurisdiction and that the appellants had the requisite standing to raise the issues but found that the statute did not violate the Constitution as alleged. Accordingly they dismissed the complaint on the merits (45 A.D.2d 365, 357 N.Y.S.2d 116). The order of the Appellate Division should be affirmed.

Section 270 of the Tax Law imposes a tax "on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock". The tax depends on the value of the stock, the maximum tax being 5 cents per share. When the sale is made within the State, the tax may be levied on any of these events, but no more than one of them (20 NYCRR 440.2). When the sale and all the accompanying negotiations occur outside the State—as on one of the appellants' exchanges—no tax is due unless the stock is transferred in New York by a local transfer agent or upon the corporate books (see, e. g., *Matter of Monarch Life Ins. Co. v. State Tax Comm.*, 32 N.Y.2d 850, 346 N.Y.S.2d 272, 299 N.E.2d 684).

The constitutionality of this statute, originally enacted in 1905, has been sustained on several occasions against claims that it violated due process, equal protection (*Hatch v. Reardon*, 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415) and the commerce clause (*O'Kane v. State of New York*, 283 N.Y. 439, 28 N.E.2d 905; cf. *Hatch v. Reardon, supra*). It is now well settled that the commerce clause does not prohibit the States from levying a tax on the transfer of property within the State (*International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 348, 64 S.Ct. 1019, 88 L.Ed.

1313; cf. *Freeman v. Hewit*, 329 U.S. 249, 258, 67 S.Ct. 274, 91 L.Ed. 265). Thus far the parties are agreed—the basic tax is constitutionally valid.

In 1966 complaints reached the Legislature that the transfer tax was driving business from the State. Specifically the New York exchanges complained that although brokers in other States charged the same commissions, transactions on the New York exchanges were placed at a disadvantage because none of the States in which the competing exchanges were located imposed a tax on stock sales or transfers. After extensive investigation the Legislature found that "the tax on transfers * * * is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable" (L.1968, ch. 827). Accordingly the Legislature amended the tax law, adding section 270-a, which reduces the tax by 50% when a nonresident sells stock within the State. And when any shareholder, resident or nonresident, sells a large block of stock within the State, the tax due is limited to a maximum of $350.[2]

[2] These are the rates which are presently applicable. When section 270-a originally went into effect on July 1, 1969, it provided for higher rates—95% for nonresidents, and a maximum tax of $2,500. This was gradually reduced to the current rates which became effective July 1, 1973.

If section 270-a is invalidated, the prior tax scheme would again become effective (L.1968, ch. 827, § 11) and the appellants would be restored to their position of economic superiority.

First we consider the appellants' argument that the statute violates the equal protection clause "because it establishes an arbitrary classification dependent upon the place of sale." The equal protection clause is often invoked in support of a claim that a State taxing scheme is arbitrary. This is a familiar argument and the general principles are well settled.

It has been repeatedly held that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (*Madden v. Kentucky,* 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590) and that the equal protection "clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation" (*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526, 527, 79 S.Ct. 437, 440, 3 L.Ed.2d 480). To succeed on the equal protection argument, the appellants must not only overcome the presumption of constitutionality which attaches to every statute (*Madden v. Kentucky,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590, *supra*) but must also establish that there is no "conceivable state of facts which would support" the classification (*Carmichael v. Southern Coal Co.,* 301 U.S. 495 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245; *Lawrence v. State Tax Comm.,* 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102; *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351). The burden is on the one challenging the statute "to negative every conceivable basis which might support it" (*Madden v. Kentucky, supra,* 309 U.S. at p. 88, 60 S.Ct. at p. 408).

Initially we note, as did the Appellate Division, that the place of sale is not always the determining factor under the statute in question. If a small sale is involved the full tax must be paid unless the seller is a nonresident. Thus the statute also distinguishes between residents and nonresidents in favor of the latter. The avowed purpose, as the legislative history indicates, was to encourage nonresidents to sell on the New York exchanges. Similar legislation has been consistently upheld "and [it] appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment" (*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 528, 79 S.Ct. 437, 441, 3 L. Ed.2d 480).

The Appellate Division also found that the distinction between in-State and out-of-State sales could be justified on the ground that "[t]ransactions made in New York are less susceptible to tax evasion than those made outside" (45 A.D.2d p. 369, 357 N.Y.S.2d p. 120). They found that *Madden v. Kentucky (supra)* supported this conclusion and we agree. In that case the State imposed an *ad valorem* tax of 10 cents per $100 on deposits in local banks, but taxed deposits in out-of-State banks at 50 cents per $100. Although the amount of tax was based on an out-of-State event, the court found that the classification was not arbitrary within the meaning of the equal protection clause since "The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection" (*Madden,* 309 U.S. 83, 90, 60 S.Ct. 406, 409, 84 L.Ed. 590, *supra*).

Here, of course, the Legislature noted that tax evasion was one of the factors which prompted the enactment of section 270-a. But even if their motives had been more subtly stated, or completely unstated, the fact remains that this is a conceivable basis for the distinction. The Legislature, of course, is not required to "record a complete catalogue of the considerations which move its members to enact laws" (*Carmichael,* 301 U.S. 495, 510, 57 S.Ct. 868, 872, 81 L.Ed. 1245, *supra*; see, also, *Lehnhausen,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351, *supra*).

Finally the appellants argue that the distinction between sales made within the State and sales completed elsewhere discriminates against interstate commerce. The commerce clause, of course, imposes additional limitations on the States' taxing powers and "restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax" (*Toomer v. Witsell,* 334 U.S. 385, 406, 68 S.Ct. 1156, 1167, 92 L.Ed. 1460). The question in other words is no longer whether the distinction can be justified by "any conceivable state of facts which could support it" (*Carmichael, supra,* 301 U.S. at p. 509, 57 S.Ct. at p. 872). "The guiding principle which limits the power of the States to tax is that the several States of the Union may not discriminate against interstate commerce in favor of intrastate commerce." (*O'Kane v. State of New York,* 283 N.Y. 439, 446, 28 N.E.2d 905, 908, *supra*; see, also, *Robbins v. Shelby County Taxing Dist.,* 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694; *Welton v. Missouri,* 91 U.S. 275, 23 L.Ed. 347; *Memphis Steam Laundry v. Stone,* 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436; *Nippert v. Richmond,* 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760; *Best & Co. v. Maxwell,* 311 U.S. 454, 61 S.Ct. 334, 85

L.Ed. 275; *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202.)

Here, as indicated, the Legislature found that the tax as originally enacted had the reverse effect in that it conferred an economic advantage on exchanges located outside the State. The appellants do not dispute this. To neutralize this advantage, the Legislature enacted section 270-a and it seems clear that they had the power to do so. A use tax is a familiar example of this type of compensatory legislation and it is well settled that it does not offend the commerce clause (see, e. g., *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 343, 74 S.Ct. 535, 98 L.Ed. 744; cf. *Alaska v. Arctic Maid,* 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227). Thus the stated legislative goal is a valid one.

Although helpful, this is not necessarily controlling for the determinative question in each case is "whether the statute under attack * * * will in its practical operation work discrimination against interstate commerce" (*Best & Co. v. Maxwell,* 311 U.S. 454, 456, 61 S.Ct. 334, 335, 85 L.Ed. 275, *supra*).

The statute should have no practical effect whatsoever on sales by shareholders, both residents and nonresidents, involving stocks which do not have to be transferred in New York. If they sell on a New York exchange, of course they can claim the benefit of section 270-a. But if they sell on one of the appellants' exchanges, they would pay no tax at all. Here the stock transfer law still works to the appellants' economic advantage.

The sale of New York securities poses a different problem. Then the transfer tax must be paid and the amount due depends on whether the sale is made in New York or elsewhere. In the case of New York residents it is more

than likely (cf. *Nippert v. Richmond*, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760) that the sale would be made on a New York exchange in any event, so that section 270-a should have little or no "practical" effect on such transactions.

The appelants' major argument then is that section 270-a discriminates against interstate commerce by encouraging nonresidents to sell New York securities on New York exchanges. This assumes that such sales would be intrastate so that the practical effect of the statute would be to "discriminate against interstate commerce in favor of intrastate commerce" (*O'Kane*, 283 N.Y. 439, 446, 28 N.E.2d 905, 908, *supra*).

The sale of intangibles is, of course, commerce within the meaning of the commerce clause (*Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265). And we can assume that sales of New York stocks by a nonresident on an out-of-State exchange would nevertheless involve interstate commerce because the securities must ultimately be transferred in New York (but see *Hatch v. Reardon*, 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415, *supra*). But we cannot assume, as the appellants do, that if the nonresident chooses to make the sale in New York—in order to claim the exemption provided by the statute—the transaction would lose its interstate character.

Typical of this latter type of transaction is one in which a resident of one of the areas in which the appellants operate gives his New York broker, or a New York correspondent of a local broker, an order to sell. When, in such a case, the New York broker executes the order, the customer will normally send his stock certificate to the New York broker to fulfill his agreement to sell. Such a sale is not an intrastate transaction. On the contrary in

Freeman v. Hewit, 329 U.S. 249, 259, 67 S.Ct. 274, 280, 91 L. Ed. 265, *supra* the Supreme Court considered an identical transaction and concluded "Of course this is an interstate sale". In other words the trouble with the appellants' argument is that a sale by a nonresident on a New York exchange—the type of transaction the law allegedly encourages—is still interstate commerce. Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202, *supra* compels a different result since in that case this precise point was neither argued nor decided.

The order of the Appellate Division should be affirmed.

BREITEL, C. J., and JASEN, GABRIELLI, JONES, FUCHSBERG and COOKE, JJ., concur.

Order affirmed, with costs.